IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL No. 1320 OF 1999
IN
NOTICE OF MOTION No. 1136 OF 1998
IN
SUIT No. 937 OF 1998

Smt. Sheel Arora,)
having her address at)
The Sind Works Cooperative)
Housing Society Ltd., Flat) (Original
No.3, 2nd floor, Sky-Scrapper) defendant No.1)
"B" Block, Bhulabhai Desai)
Road, Bombay 400 026. ... Appellant

Vs.

1. Madan Mohan Bajaj,)
Indian Inhabitant,)
residing at the Sind Work)
Cooperative Housing Society
Ltd., Flat No.3, 2nd floor)
Sky-Scrapper Building "B") (Orig.plaintiff)
Bhulabhai Road, Bombay 26)
)

2. Daryanani (Indo-Saigaon))
Constructions Pvt. Ltd., a)
Company, incorporated under
the Companies Act, 1956,)
having its office at 421,)
Commerce House, 140,) (Original
Nagindas Master Road,) defendant No.2)
Bombay - 23.)
)

3. Sind Works Co-operative)
Housing Society, registered
under the Maharashtra Co-)
Operative Societies Act,)
having its office at Sky)
Scrappers, Plot No.4, 897,) (Original
Bhulabhai Desai Road,) defendant No.3)
Bombay 400 026.) ... Respondents

Mr. A. G. Almeda i/b Vigil Juris for the Appellant.

Mr. Girish B. Kedia for the respondent No.1.

None for respondent Nos.2,3 though served.

CORAM : R. M. S. KHANDEPARKAR
AND
D. G. KARNIK, JJ.

DATE : JUNE 7, 2007.

ORAL JUDGMENT [PER R.M.S. KHANDEPARKAR,J.] :-

. This appeal arises from the order dated 13th October 1999 passed in Notice of Motion 1136 of 1998 in Suit No. 937 of 1998. By the impugned order, the learned Single Judge has made the Notice of Motion absolute, thereby has appointed a receiver for the suit premises.

2. The respondent No.1 has filed Civil Suit claiming declaration that the plaintiff and the appellant herein, who is the defendant No.1 in the suit are the owners in respect of shares bearing Nos. 306 to 310 and of the flat No.3 on the second floor, and also of garage No. 17 on the ground floor of the building known as "Skycraper Building - B block, situate at Bhulabhai Desai Road, Mumbai, and consequently for the partition of the suit

property. Pending the hearing and disposal of the suit, the plaintiff took out the Notice of Motion, seeking an order of appointment of Court Receiver in respect of the suit property and also seeking relief of temporary injunction. By the impugned order, the learned Single Judge restricted relief in the nature of appointment of Court receiver and refused to grant any other relief. At the time of admission of the appeal, while staying the impugned order, temperory injunction was granted in terms of prayer Clause (b) of the Notice of Motion, whereby the appellant was restrained from transferring or alienating or parting with the possession and or creating any third party right in the suit premises during pendency of the appeal. Prior to the said interim order on 2nd November 1999 as it was informed to the Court that the receiver had already taken formal possession, it was directed that the receiver shall not take actual possession of the suit premises, nor shall claim any royalty from the occupants of the premises.

3. The impugned order is sought to be challenged, mainly on the ground that there was no prima-facie case made out by the respondent No.1 for appointment of receiver in relation to the suit premises.

4. Upon hearing the learned advocates for the parties and perusal of the documents, the only point that arises for consideration is - whether in the facts and circumstances of the case, the respondent No. 1 had made out prima facie case to warrant appointment of receiver in relation to the suit premises.

5. The learned Single Judge has held that the documentary evidence in the form of gift deed executed by the respondent No.1 in favour of husband of the appellant, discloses that 50% of the consideration amount was paid by the respondent No.1, and the same prima facie discloses that respondent No.1 has 50% share in the suit flat. However, the appellant has inducted a paying guest in the premises and thereby receives a sum of Rs.65,000/- per month from paying guest, exclusively for herself and

to the exclusion of the respondent No.1. Referring to Section 17 of the Registration Act, Section 123 of the Transfer of Property Act, and the decision of the Apex Court in **Smt. Gomtibai (dead) through LRs and others, Appellants Vs. Mattulal (dead) through LRs., Respondents** reported in **AIR 1997 Supreme Court 127**, it has been held that the property could not be said to have been transferred to the donee under the gift deed, as the said gift was revoked by the donor before the registration of the gift deed.

6. The perusal of the plaint and other materials on record undoubtedly disclose that it is the case of the respondent No.1 that he was ill-advised to make a deed of gift in respect of the suit premises and accordingly he had executed a gift deed on 23rd February 1995 in favour of Hiralal Arora, who was the husband of the appellant herein and that subsequently, the said gift deed was revoked because the respondent No.1 was lateron advised that no such gift could have been made by her because Hiralal could not be beneficiary/ donee of the

respondent No.1's property under the Gift Act. It is also pleaded that the deed of revocation was executed by the respondent No.1 on 7th August 1996 and was duly lodged for registration with the concerned sub-registry on 27-8-1996 and that therefore, the revocvation of the gift is valid and that, therefore, the right, title and interest of one half portion of the suit premises belongs to the respondent No.1.

7. It was the contention on behalf of the appellant that by the registered gift deed dated 23rd February 1995, the respondent No.1 had gifted his whole of 50% right, title and interest in the suit premises to Hiralal Arora, the husband of the appellant, and therefore, the respondent No.1 has no right, title and interest in the suit premises and that the alleged revocation of the gift was by the respondent No.1 alone and that too after acceptance of the gift by the donee and in contravention of the provisions of law and, therefore, void. It was sought to be contended that once the gift is accepted, the transaction

stands concluded, and thereafter it cannot be unilaterally cancelled or revoked. It was further sought to be contended on behalf of the appellant that the entire amount of consideration for the purchase of the suit premises was paid through the constituted attorney of the appellant, namely her husband by two demand drafts of Rs.75,000/- each and that the respondent No.1 had not contributed any amount of money for the purchase of the suit premises.

8. By the impugned order the learned Single Judge has held that though the gift deed was lodged for registration, it was not registered till the date of passing of the order and in addition thereto, there was a deed of revocation dated 27th August 1996 lodged for registration. It is only the appellant who is in control and possession of the suit flat. Besides, 50% of the amount of purchase price of the suit premises was contributed by the respondent No.1 and this fact is confirmed by the contents of the gift deed itself. All these facts reveal that the appointment of

receiver was justified.

9. It is pertinent to note that it is the case of the respondent No.1 himself that the gift deed dated 23rd February 1995 was duly executed by the responden No.1, accepted by the donee, and was lodged for registration. The same undoubtedly discloses a clear admission on the part of the Respondent No.1 to the effect that the suit premises had been already gifted in favour of the husband of the appellant. At the same time, undoubtedly, there has been a claim by the respondent No.1 that the said gift was revoked. It is therefore, necessary to see whether the respondent No.1 has been able to establish prima facie that the said gift was factually and legally revoked. In other words, whether the said deed of revocation effectively nullifies the said gift made and admitted by the original respondent No.1.

10. Section 122 of the Transfer of Property Act defines "Gift" as the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one

person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be during the life time of the donor and while he is still capable of giving and similarly, if the donee dies before acceptance, the gift is void.

11. Section 123 of the Transfer of Property Act deals with the subject of transfer of the gifted property. It provides that, for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, transfer must be effected either by registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

12. Section 126 of the Transfer of Property Act deals with the subject of suspension or revocation of the gift-deed. It provides that, "the donor and donee may agree that on the

happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be. A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked. Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice."

13. The provisions of law, as comprised in Chapter VII of the Transfer of the Property Act regarding the subject of gift clearly disclose that gift of an immovable property takes effect on execution of a document and acceptance of such gift by the donee. Undoubtedly the instrument in that regard, is required to be registered to claim benefits under the instrument.

14. In **Smt. Gomtibai's** case before the

Apex Court admittedly there was no written instrument executed by donor in favour of the person claimed to be donee. In those circumstances, it was observed by the Apex Court that the pre-existing right, title and interest of donor could stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property . Those were the proceedings for partition of a property. However, a share in the property was claimed on the basis of a gift which could not be established by producing any written instrument in that regard. That is not the case in the matter in hand.

15. In the case in hand as seen above, it is clearly admitted by the respondent No.1 that he had executed valid gift deed in favour of the husband of the appellant and the same was lodged for registration. Undoubtedly, simultaneously a claim is putforth that subsequent to the execution of the gift deed and lodging thereof for registration, there was

a deed of revocation unilaterally executed by him and lodged for registration. It is pertinent to note that the statement regarding execution of the deed of revocation of gift in the plaint nowhere refers to the participation of the husband of the appellant in execution of such deed of revocation, and that too in spite of a specific averment to the effect that the husband of the appellant was party to the gift deed to confirm the acceptance of the gift. In other words, as the matter stood on the date of passing of the impugned order, there was a valid gift deed executed by the parties and lodged for registration. It is not the case of respondent No.1 that the registration of the deed was objected to in any manner by the respondent No.1 or that there are valid and lawful impediment for completion of the registration of the said gift deed. On the contrary, after lodging the duly executed gift-deed for registration, there was an unilateral attempt on the part of the respondent No.1 to revoke the said gift deed. Question of revocation can not arise unless there exists a gift deed. Section 126 of the

Transfer of Property Act, as seen above, provides that the revocation of gift can be only in cases specified thereunder and the same requires participation of the donee. In the case in hand, admittedly there was no participation of the donee in an effort on the part of the donor to revoke the said gift deed. On the contrary, unilateral effort on the part of the donor by execution of a deed of revocation itself disclose that the donor had clearly accepted the legal consequences which are to follow on account of a execution of valid gift deed, and presentation thereof for registration. In the absence of any legal impediment for registration, the document on the registration takes effect from the date of execution of such document. It is very clear from Section 47 of the Registation Act 1908, that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. Besides, bearing in mind the provisions of law comprised under Section 126 of the Transfer of Property Act, the deed of

revocation has to be executed by donor as well as donee. In terms of Section 32 of the Indian Registration Act 1908, every document to be registered under the Act shall be presented by all the persons who are required to execute such document. And such presentation has to be within a period of 4 months from the date of execution. Albeit, all the parties may not appear before the Registering Authority to admit the execution of document at the same time, and can avail the benefit of Section 32 of the Act and can appear independently within 4 months from the date of the execution of document. Admittedly, in the case in hand, neither the deed of revocation was executed by the donee nor the donee appeared before the registering Authority to admit the execution of such deed within 4 months from the date of either execution of the same by the donor alone or even within 4 months from the date of presentation of the same for registration. Obvisously, therefore, the deed of revocation cannot be registered under the Act. Being so, on the day of passing of the impugned order, there was a clear admission on the part of the

respondent No.1, about absence of title or right to the suit premises in his favour.

16. Once the pleadings in the plaint prima-facie disclose that the title of the property exists in favour of the defendant, and the plaintiff is not able to show any better title to the same on the date of the filing of the suit, question of appointment of receiver on allegation of either damage, waste or mis-use of such property by the defendant can hardly arise.

17. The impugned order refering to the gift deed dated 23rd February 1995 executed by the respondent No.1 in favour of the husband of the appellant records a finding to the effect that the same discloses that part of the consideration to the extent of Rs.75,000/- for the suit premises was paid by the respondent No.1. However, pleadings of the parties and in particular of the appellant in her reply disclose a categorical statement to the effect that "the entire consideration in respect of the suit premises were paid by me through my

then constituted attorney Hiralal Arora, by 2 demand drafts bearing Nos.A-01618 and A-01619, both drawn on Bank of Baroda dated 5-9-1975 each for Rs. 75,000/- in favour of T.A. Abdul Rehman and no part of the consideration money was ever paid by the plaintiff". Undoubtedly, in the plaint there was a claim by the plaintiff to the effect that, " the plaintiff paid 50% of the consideration under the said agreement by demand drafts." The agreement dated 8th September 1975 to which a reference is made in the pleadings in the plaint in relation to the payment of Rs.1,50,000/- reads thus-

> "before the execution of the assignee has paid to the asigner whole amount of Rs.1,50,000/- only being full payment of the ...."

The recital part of the agreement describes expression "assignees" in relation to the property to be Mrs. Khurshid alias Sheel and Mr. Madan Mohan Bajaj. In other words transfers in respect of the property which is

the subject matter of the assignment are described as the "assignees". However, the agreement as far as, it relates for the fact of payment of Rs. 1,50,000/- is cancelled, it refers only to "assignee". As against this, though there was a rejoinder filed by the respondent No.1, except bare denial of the statement of fact about the payment of money by the appellant under two drafts , there is no specific denial of all the details about the payment described by the appellant in the written statement. It is merely pleaded that, "it is however, true that Hiralal Arora has paid 50% of the consideration amount namely Rs.75,000/- for the suit flat and the balance consideration of Rs.75,000/- was paid by the plaintiff". Though while affirming the claim of payment of consideration, the appellant in her affidavit had specifically described details of such payment and mode of payment, the respondent No.1 did not find it convenient to reply to those specific averments in that regard. When the appellant in her reply had categorically stated that a sum of Rs.1,50,000/- was paid by two demand drafts,

specifying the number and the date of demand drafts as also the amount for which they were issued and the bank on which they were drawn, it was not sufficient for the respondent No.1 merely to deny the said averments without even specifying the manner in which the amount of Rs. 75,000/-, if really so, was paid by the plaintiff. It was necessary to disclose the same in the rejoinder with sufficient particulars to corroborate such claim. Nothing of that sort has been done by the plaintiff.

18. In the background of above facts, in our considered opinion, it was totally undesirable and unsafe to rely upon the statement made by the respondent No.1 in the deed of gift executed by him in favour of the husband of the appellant to the effect that, the part of consideration namely sum of Rs.75,000/- was paid by the respondent No.1 to the original owner of the property.

19. Appointment of receiver is not to be made as a matter of course. There has to be a case made out to justify the same. By

appointment of receiver, owner's right to enjoy his property in the best possible manner to his choice stands curtailed. Being so, one has to take sufficient precutions and utmost care, not to divest the owner of his property from its enjoyment and certainly not on the basis of fanciful plea made by other parties.

20. For the reasons stated above, we do not find any case having been made out for appointment of receiver in respect of the property in question. Repeatedly the learned advocate appearing for the respondent No.1 tried to draw our attention to paragraphh 7 of the plaint, stating that some nefarious, notorious and illegal activities are being carried out by the appellant in the suit premises. If the illegal activities are carried out in the premises, there are ways and means to stop the same by adopting and taking out proper proceedings for that purpose. That by itself, however, will not entitle the respondent No.1 to get the receiver appointed for the suit premises. Besides mere allegation in that regard cannot be substituted for the

evidence about such activities.

21. In the absence of case being made out, warranting appointment of receiver, in our considered opinion the learned Single Judge erred in allowing the Notice of Motion for appointment of receiver and hence the impugned order cannot be sustained and is liable to be set aside and is therefore, hereby set aside. Notice of Motion taken out for appointment of receiver stands discharged.

22. As regards the relief of injunction which was granted at the time of admission of appeal and also which was granted when the Notice of Motion was taken out, once it is found that no prima facie case is made out about any subsisting right of the respondent No.1 in or to the property or that such right could be affected on account of any activity by the respondent in the suit premises, we do not find any justification for continuation of the relief of injunction.

23. Hence the appeal succeeds, the impugned

order is set aside and Notice of Motion taken out by the plaintiff is dismissed. No order as to costs.

24. At this stage, on the request of the learned advocate for the respondent, the interim relief which was granted at the time of admission, shall remain in force for a period of twelve weeks.

Sd/- Sd/-

[D. G. KARNIK, J.] [R.M.S. KHANDEPARKAR, J.]